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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 340

W. ASTOR KIRK and VIVIAN M. KIRK, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, W. Astor Kirk and Vivian M. Kirk, husband and wife, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 9, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at ..... (not yet officially reported). It is printed at Appendix A, *infra*, p. 1a. The decision of the Tax Court is reported at 51 T.C. 66 (1968). It is contained in the Joint Appendix, pp. 15-29.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1) Where the government has a policy and program of maintaining a class of tax free rental allowances, where only ecclesiastical factors are used to define that class, and where a rental allowance is excluded from the said class by the Commissioner of Internal Revenue solely on the ground that the recipient of the rental allowance in question does not have the requisite ecclesiastical status; is the resultant discrimination against that recipient in violation of due process requirements of the Fifth Amendment?

2) Where the government employs ecclesiastical factors exclusively (a) to define a class of tax free rental allowances and (b) to exclude a particular individual's rental allowance from the privileged class thus defined, does this constitute governmental action respecting an establishment of religion within the meaning of the First Amendment?

THE STATUTE INVOLVED

The statutory provisions involved are the following sections of the Internal Revenue Code of 1954: § 107, 26 U. S. C. § 107; and § 6213(a), 26 U. S. C. § 6213(a). They are printed at Appendix B, *infra*, p. 73a.

STATEMENT OF THE CASE

This case arises out of an exclusion by the Commissioner of Internal Revenue, on September 8, 1966, of petitioners'[1] rental allowance from the government's

[1] Vivian M. Kirk is joined as petitioner only by reason of the filing of a joint return with her husband.

class of tax free rental allowances. That exclusionary act of the Commissioner resulted in a deficiency in petitioner's tax returns for tax year 1964. Petitioner filed a written protest against exclusion of his rental allowance from the government's class of tax free rental allowances. Since the protest involved only constitutional considerations, the Appellate Division of the Internal Revenue Service summarily rejected it, and the Commissioner issued a statutory notice of deficiency.

On November 21, 1966, petitioner filed a petition with the Tax Court, pursuant to 26 U. S. C. § 6213(a) (Appendix B, *infra*, p. 7a), praying in effect that the Tax Court issue such order as may be necessary to prohibit the government from "arbitrarily and unreasonably" discriminating against him. The Tax Court rendered its opinion on October 17, 1968, and on November 26, 1968, it entered its decision against petitioner. Petitioner filed a Notice of Appeal to the Court of Appeals for the District of Columbia on February 24, 1969. The Appeals Court affirmed the decision of the Tax Court on March 9, 1970. Petition for rehearing was denied on April 9, 1970.

FACTS FOUND

The essential facts were stipulated. The Court of Appeals accepted the findings of fact made by the Tax Court. Thus, the facts briefly stated herein are those summarized by the Court of Appeals.

A. PETITIONER'S EMPLOYER

Petitioner (W. Astor Kirk) was employed during the tax year 1964 by the General Board of Christian Social Concerns of the Methodist Church, an agency of that denomination which promotes, sponsors and ad-

ministers programs of social research, education, and action covering a broad range of issues of national and international importance. Petitioner served as director of the Department of Public Affairs in the Board's Division of Human Relations and Economic Affairs.

B. PETITIONER WAS A PROFESSIONAL EMPLOYEE

W. Aster Kirk was one of twelve professional employees of the Board, nine of whom were ordained ministers in the Methodist Church. Petitioner, however, was not an ordained, commissioned, or licensed minister of the gospel, although he is a member of the Methodist Church, a denomination which provides for ordination of its ministers. The services provided by petitioner as an employee of the Board "were not different in character from those performed by the eleven remaining professional employees . . . These services were not sacerdotal in character, nor did they involve the conduct of religious worship."

C. RENTAL ALLOWANCE POLICY OF THE BOARD

Petitioner's employer maintained a policy of providing rental allowances for all of its professional employees. Petitioner received a rental allowance in the amount of $2,624.97 during the tax year 1964. He treated this sum as if it were included in the government's class of tax free rental allowances, and made a full disclosure of the fact that it was not reported as taxable income. Petitioner's rental allowance constituted a part of the remuneration for the services rendered by him to the Board, and the entire allowance was used "to rent or otherwise provide a home during tax year 1964."

D. ACTION OF THE GOVERNMENT

Pursuant to 26 U. S. C. § 107 (Appendix B, *infra*, p. 7a) the rental allowance was allowed by the government as an exclusion from income taxation for the nine "ministers of the gospel" employed by the Board, but was not so allowed for petitioner and the other two professional employees who are not "ministers of the gospel."

DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the Tax Court (Appendix A, *infra*, p. 6a). It held that (1) exemptions of rental allowances from tax liability are a matter of governmental "grace"; (2) since petitioner is not a "minister of the gospel," his rental allowance does not come within the purview of 26 U. S. C. § 107(2); and (3) since petitioner cannot benefit from the provisions of that statute, he cannot challenge the constitutionality of the government's scheme of classification represented by 26 U. S. C. § 107(2). Thus, the Court of Appeals refused to decide the fundamental substantive issued raised by petitioner: As applied to the facts of his case, does the definitive use of ecclesiastical norms by the government to define a tax-free class of rental allowances, from which class his allowance is excluded, violate prohibitions of the Fifth and First Amendments?

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. The Question of the Right of a Taxpayer To Raise a Relevant and Fundamental Constitutional Issue in a Proceeding Under 26 U. S. C. § 6213(a)

Under 26 U. S. C. § 6213(a) (Appendix B, *infra*, p. 7a), a taxpayer may challenge a determination of tax deficiency with respect to his tax return. In the instant case, the determination of tax deficiency is an integral part of an acknowledged scheme of governmental class definition. In his petition for a redetermination of deficiency pursuant to the provisions of 26 U. S. C. § 6213(a), petitioner challenged the validity of the scheme of class definition. He contended that, in the context of the facts of his case, that scheme involves constitutionally impermissible discrimination against him; and, additionally, it amounts to governmental action respecting an establishment of religion.

That constitutional issue was asserted before both the Tax Court and the Court of Appeals. The latter Court decided, at least inferentially, that a proceeding under 26 U. S. C. § 6213(a) does not afford a proper procedure for raising and asserting a constitutional issue of "impermissible discrimination," or of invalid governmental action "respecting an establishment of religion." The only apparent exception permitted by the appeal court's ruling is where a taxpayer is able to show that he would derive a direct and tangible *financial benefit* from a judicial declaration that discrimination against him is constitutionally impermissible or that the governmental scheme of class definition is otherwise invalid.

Thus, presumably if the scheme of classification provided that only in the case of a *white* person may a

rental allowance be exempted from taxation, then a *Negro* recipient of a rental allowance would be precluded from utilizing 26 U.S.C. § 6213(a) to challenge the constitutional permissibility of the discrimination inherent in the statute.

The Petition filed with the Tax Court assigned as an error of the Notice of Deficiency "an interpretation of law" which denies to petitioner the right "not to be arbitrarily and unreasonably discriminated against" with respect to relief of rental allowance income from the burden of taxation. (Joint Appendix, p. 4).

Apart from any rights of a taxpayer, it would seem to be a caricature of the judicial function to limit a court's jurisdiction, in a proceeding under 26 U.S.C. § 6213(a), to reviewing the *correctness* of a deficiency solely in terms of its consistency or lack thereof with a public policy which itself is constitutionally suspect.

This Court should settle the question of the standing of a party with a bona fide and primary interest in the outcome of the litigation to raise a relevant and fundamental constitutional issue inextricably involved in a proceeding initiated under 26 U.S.C. § 6213(a).

II. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH FUNDAMENTAL PRINCIPLES INHERENT IN APPLICABLE DECISIONS OF THIS COURT

A. The Principle That the Authority of Government To Act as a Matter of "Grace" Is Circumscribed by Constitutional Proscriptions and Prescriptions

The Court of Appeals appears to have assumed that governmental "grace" is without constitutional parameters. Hence an inference can be drawn, reasonably and easily, from that Court's decision that government may discriminate at will among recipients of rental

allowances, with respect to granting a privilege of exempting such allowances from tax liability. In any event, the decision of the Court of Appeals has a practical effect of sanctioning the proposition that a taxpayer whose rental allowance is excluded from a governmentally defined category of tax exempt rental allowances, is precluded from challenging the constitutionality of the particular scheme of classification involved. The Court of Appeals cited *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435 (1934), and *United States* v. *Olympic Radio and Television, Inc.*, 349 U.S. 232 (1955), as authority for that proposition. Neither of these cases can be invoked to support a premise that the authority of government to act as a matter of "grace" is uncircumscribed by constitutional limitations.

In *New Colonial Ice Co.* v. *Helvering*, this Court simply affirmed the general rule that "whether and to what extent" any income is exempt from tax liability "depends upon legislative grace." *Ibid.*, p. 440. In *United States* v. *Olympic Radio and Television*, this Court merely recognized that a particular tax exemption is obtained "not as a right, but as of grace." Hence the taxpayer company there involved had "the burden to show that it is within the provision allowing the deduction." *Ibid.*, p. 235.

Thus the central issue in *New Colonial Ice Co.* v. *Helvering* and *United States* v. *Olympic Radio and Television* did not involve a constitutional question. The only question was whether or not the taxpayers who were parties to those cases could be brought within statutory provisions, uncontested as to their constitutional validity, which allowed particular tax deductions.

An entirely different fundamental issue is involved in the instant case. It is the issue whether or not the government may constitutionally use ecclesiastical norms alone either (1) to delineate a class of tax free rental allowances, or (2) to exclude a particular allowance from an otherwise valid tax exempt category. Neither is the issue here a question of impartial treatment of all persons acknowledged to be within the scope of a privileged class created by governmental action; rather, it is a question of the constitutional propriety of excluding certain individuals from the privileged class solely because they are not "ministers of the gospel."

Any assumption that *New Colonial Ice Co.* v. *Helvering* and *United States* v. *Olympic Radio and Television* provide authority for a premise that any exercise of governmental "grace" is constitutionally uncircumscribed is eroded by this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

In *Speiser* v. *Randall*, this Court unequivocally informed California government officials that they were

> "plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Ibid.*, p. 518.

In the same case, on the other hand, this Court acknowledged approvingly the recognition by the California courts

> "that conditions imposed upon the granting of privileges or gratuities must be reasonable." *Ibid.*, p. 518.

In *Sherbert* v. *Verner*, this Court flatly rejected the argument of South Carolina that its unemployment

compensation statute was immune to constitutional challenge because unemployment compensation benefits are not a matter of "right" but merely a "privilege." *Ibid.*, p. 404. This Court emphatically stated that,

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Ibid.*, p. 404.

This Court should decide whether or not it is constitutionally permissible for the government, purporting to act as a matter of "grace," to exempt from tax liability only rental allowances received by Board employees who are "ministers of the gospel."

B. The Principle Respecting Which Party Must Sustain What Burden Where an Issue of Constitutional Due Process Is Asserted in a Tax Case

The Court of Appeals held that petitioner must sustain the burden of proving that his rental allowance comes within the scope of exemptions allowed by 26 U.S.C. § 107(2) (Appendix B, *infra*, p. 7a). That holding of the Court of Appeals is in error. The only burden that petitioner must sustain is that of proving the following proposition: That he is entitled to have his rental allowance treated no differently from the treatment of the rental allowance of other employees of the Board, *unless a differential treatment can be justified as directly and substantially supportive of a legitimate public objective within the constitutional competence of the government to effectuate.*

On the other hand, the government must sustain the burden of proving that its discrimination against rental allowances received by Board employees who

are not "ministers of the gospel" is supportive of a constitutionally legitimate end related to the public interest.

This Court has recognized the principle that constitutional due process is "an interest of transcending value." *Speiser* v. *Randall*, 357 U.S. 513, 525-526. Where a due process right is asserted in a tax case challenging the validity of discrimination against a taxpayer, the government must sustain the burden of proving that its scheme of classification is "reasonable," or is otherwise permissible. *Ibid.* Thus, due process considerations command that no taxpayer shall be discriminated against with respect to rendering his rental allowance for taxation unless the government has borne the burden of proving that a public purpose within the scope of its constitutional competence to effectuate, is or will be accomplished thereby.

This Court should settle the question of whether or not the government shall be required to justify, on reasonable grounds related to a valid public interest, its scheme of classification, which discriminates against Board employees who are not "ministers of the gospel" with respect to their rental allowance income.

III. THIS CASE INVOLVES A CONSTITUTIONAL ISSUE OF FUNDAMENTAL PUBLIC IMPORTANCE WHICH SHOULD BE SETTLED BY THIS COURT

A. The Issue of Whether or Not Government Can, Consistent With the Strictures of the First Amendment's Establishment Clause, Create a Class of Tax Free Rental Allowances for "Ministers of the Gospel" Alone

Because of its restricted application of 26 U.S.C. §6213(a) (Appendix B, *infra*, p. 7a), the Court of Appeals refused to decide the question raised by petitioner, of whether or not preferential relief of

"ministers of the gospel" of the burden of taxation of rental allowance income, contravenes the prohibitions of the First Amendment's Establishment Clause.

Throughout this Nation, hundreds of thousands of professionally trained persons who are not "ministers of the gospel," are employed by religious, charitable, and educational private nonprofit entities.[2] A substantial number of such employees, like petitioner in the instant case, receive rental allowance income as part of the compensation for their services. They, as well as the organizations which employ them, have a genuine interest in this case. Thus, the issue of the validity of the government's policy of providing a preferential subvention for "ministers of the gospel" is a constitutional issue of fundamental public importance.

Petitioner has a direct, personal, and primary interest in obtaining judicial scrutiny of the government's policy involved here. Exemption of rental-allowance income from taxation is essentially a government subsidy. In the instant case, if petitioner's rental allowance were included in the government's tax free category, the net value to him of the subsidy would be $557.33. (Appendix A, *infra*, p. 1a). A Board employee not allowed that subsidy, *for no reason other than the fact that he is not a "minister of the gospel,"*

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[2] One report has shown, for example, that in 1965 more than 68,000 non-ministers were employed by all the national agencies and local non-profit entities related to the Methodist Church. See U. S. Congress, House Committee on Ways and Means (89th Cong., 1st Sess.), *Hearings on H. R. 8282*, Part 4, p. 1608. Relative to the size of their membership and scope of activities, other denominations and interdenominational bodies employ a similar number of professionally trained non-ministers.

is entitled to know if any public interest is served by granting that subsidy to his colleagues who are clergymen.

This case was initiated with one paramount purpose in mind. (See Memorandum Filed with Tax Return for 1964, Appendix C, *infra*, p. 8a). That purpose is to secure judicial scrutiny of the government's policy and program incorporated in 26 U.S.C. § 107(2) (Appendix B, *infra*, p. 7a).

While the government is surely under no obligation to exempt any rental allowance income from tax liability, the imposition of a condition that a recipient thereof be a clergyman to qualify such income for the gratuitous benefit of tax exemption, is of doubtful constitutional validity.

The principles for judging whether or not a public policy like that incorporated in 26 U.S.C. § 107(2) conforms to the requirements of the Establishment Clause, have evolved from a series of historic decisions of this Court. The authoritative principles derived from those decisions are epitomized in the rule that governmental actions affecting religious interests are sustainable under the Establishment Clause only if such actions are in pursuit of a *secular purpose* and have, in their actual operation, *a primary secular effect*. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), p. 222.

This Court should settle the question whether or not (1) an identifiable secular purpose and (2) a primary secular effect are in fact involved in the government's exclusion from its category of tax free rental allowances *those rental allowances received by Board employees who are not "ministers of the gospel."*

APPENDIX A

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,901

W. ASTOR KIRK and VIVIAN M. KIRK, APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Tax Court of the United States

Decided March 9, 1970

Mr. W. Astor Kirk, pro se, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Department of Justice, for appellee. *Mr. Johnnie M. Walters*, Assistant Attorney General, *Mr. Lee A. Jackson*, *Mr. Lester B. Snyder*, and *Mr. Louis M. Kauder*, Attorneys, Department of Justice, were on the brief for appellee.

Before: McGOWAN and MACKINNON, *Circuit Judges*, and *JAMESON, *Senior District Judge*.

JAMESON, *District Judge*: This is an appeal from a decision of the Tax Court[1] affirming the Commissioner's determination of a deficiency in income tax due from appellants, W. Astor Kirk and Vivian M. Kirk,[2] for the tax year 1964 in the amount of $557.33. Appellants resided in Washington, D.C. during the tax year 1964 and in Austin, Texas, when their petition was filed. They have stipulated that the decision of the Tax Court may be reviewed by this court.[3]

* Sitting by designation pursuant to the provisions of Title 28 U.S. Code Section 294(d).

[1] Kirk v. Commissioner of Internal Revenue, 1968, 51 T.C. 66.

[2] Vivian M. Kirk is joined as appellant only by reason of the filing of a joint return with her husband.

[3] Pursuant to 26 U.S.C. § 7482(b)(2).

The facts are stipulated. W. Astor Kirk was employed during the tax year 1964 by the General Board of Christian Social Concerns of the Methodist Church,[4] an organization which promotes, sponsors and administers programs of social research, education, and action covering a broad range of issues of national and international importance.[5] Kirk served as director of the Department of Public Affairs in the Board's Division of Human Relations and Economic Affairs.

Kirk was one of twelve professional employees, nine of whom were ordained ministers in the Methodist Church. Kirk, however, "was not an ordained, commissioned, or licensed minister of the gospel",[6] although he is a member of the Methodist Church, which provides for ordination of its ministers.

The services provided by appellant as an employee of the Board "were not different in character from those performed by the eleven remaining professional employees * * *. These services were not sacerdotal in character, nor did they involve the conduct of religious worship".

The Board maintained a policy of providing housing and allowances for all of its professional employees. Appellant received a rental allowance in the amount of $2,624.97 during the tax year 1964. This sum was not reported as in-

[4] Pertinent excerpts from the 1964 edition of the Doctrines and Disciplines of the Methodist Church describing the organization, powers, duties and responsibilities of the Board were attached to the stipulation as a joint exhibit.

[5] The issues include race relations, civil liberties, public policy on education, church and state relations, American foreign policy, the United Nations and related international organizations, disarmament and nuclear weapons control, drug control, foreign aid, alcohol problems, juvenile delinquency, mental health, problems of aging, population and planned parenthood, and the penal system and rehabilitation of criminals.

[6] It was further stipulated that appellant had no intention "of becoming an ordained, commissioned or licensed minister of the gospel in any religious denomination of whatsoever nature".

come, although appellants did make a full disclosure of the fact that the sum was not reported. This rental allowance constituted a part of the remuneration for the services rendered by Kirk to the Board, and the entire allowance was used "to rent or otherwise provide a home during tax year 1964".

26 U.S.C. § 107 provides:

> "In the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."

Pursuant to this section the rental allowance was allowed as an exclusion for the nine "ministers of the gospel" employed by the Board, but not for the three professional employees who were not ministers of the gospel.

Appellants seek an order which would "Prohibit the Commissioner from arbitrarily and unreasonably discriminating against * * * Kirk with respect to a taxpayer's privilege of excluding from gross income the rental allowance paid, as part of compensation, by the board to rent or otherwise provide a home". In essence appellants contend (1) that the determination of the Commissioner that they are not entitled to the exclusion is "an arbitrary, unreasonable, and hence impermissible" discrimination against the taxpayer; and (2) that "[a] governmental determination denying Kirk the exclusion of his rental allowance from taxation, while the exclusion is granted to his associates who are ministers, violates the establishment clause of the First Amendment".

It is a well established rule that exclusions and deductions are matters of "legislative grace; and only as there is clear provision therefor can any particular deduction be allowed". New Colonial Ice Co. v. Helvering, 1934, 292 U.S.

435, 440, 54 S.Ct. 788, 78 L.Ed. 1348.[7] "The taxpayer has the burden to show that it is within the provision allowing the deduction". United States v. Olympic Radio and Television, Inc., 1955, 349 U.S. 232, 235, 75 S.Ct. 733, 99 L.Ed. 1024.

Appellants have failed to sustain this burden. Section 107(2) is unambiguous. It excludes rental allowance from the gross income of a "minister of the gospel". The Tax Court found that the excerpts from the Methodist Church Discipline "clearly establish the Board of Christian Social Concerns as an institution dedicated to the spreading of the 'gospel'—the glad tidings or message of Methodism". Accordingly under the statute and applicable regulations[8] an ordained minister of the gospel employed by the Board was entitled to the exclusion of his rental allowance from his gross income.

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[7] See also Deputy v. DuPont, 1940, 308 U.S. 488, 493, 60 S.Ct. 363, 84 L.Ed. 416; Interstate Transit Lines v. Commissioner, 1943, 319 U.S. 590, 593, 63 S.Ct. 1279, 87 L.Ed. 1607, reh. den. 320 U.S. 809, 64 S.Ct. 26, 88 L.Ed. 489.

[8] In discussing the applicable statute and regulations, the Tax Court said:

> "Paragraph (2) of section 107 appeared first in the Internal Revenue Code of 1954 to clarify the discrepancy between rental allowances paid by congregations and residences actually furnished by them. As to the latter case, paragraph (1) of section 107, originally section 213(b)(11) of the Revenue Act of 1921, had excluded from gross income the rental value of a dwelling house furnished to a minister of the gospel as part of his compensation.
>
> "Section 1.107-1, Income Tax Regs., provides that in order to qualify for the exclusion, the rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. Section 1.1402(c)-5(b)(2), Income Tax Regs., provides that 'service performed by a minister in the exercise of his ministry includes * * * the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations) * * *.'" 51 T.C. at ——.

In holding that the exclusion was not available to appellants, the Tax Court well said:

> "Granting that petitioner performed services that are ordinarily the duties of a minister of the gospel, another requirement of the regulations is that petitioner *be* a minister of the gospel. Specifically the regulations *require* him to be 'a duly ordained, commissioned, or licensed minister of a church or a member of a religious order.' * * * Petitioner is a member of a church which provides for the ordination of ministers. He does not claim to be ordained. Nor is he 'licensed' in the sense that he has any official document or other indicia of permission, formally conferred upon him, to perform sacerdotal functions. We do not think he is 'commissioned.' No congregation or other body of believers was committed to his charge. The duty of spreading the gospel, either by sermon or teaching, was not formally entrusted to his care. Petitioner here is merely a non-ordained church employee. *Robert D. Lawrence*, 50 T.C. 494 (1968). Furthermore, all the services performed by petitioner in this case were of secular nature."
>
> * * *
>
> "The exclusion is not provided to a broad class of persons from which petitioner is excluded solely because he is not a minister. The exclusion is granted by legislative grace to *ministers of the gospel* alone. All persons who are not ministers are denied this grace, * * *. The Commissioner has not unconstitutionally discriminated against the petitioner by denying him the benefit of an exclusion he has not shown himself entitled to." (Emphasis in original) 51 T.C. at ——.

We agree. It was expressly stipulated that Kirk was not a "minister of the gospel". Appellants accordingly are not entitled to the benefit of the exclusion.[9]

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[9] Appellants' reliance on Abraham A. Salkov, 1966, 46 T.C. 190, 199 is misplaced. In that case the Tax Court concluded that

With respect to appellants' contention that section 107(2) violates the constitution for the reason that it tends toward the establishment of religion, the Tax Court suggested that this was "an interesting inquiry", but refused "to pursue it * * * because petitioner would not be entitled to the exclusion in any event".

As we read appellants' briefs, it is their position that the denial to them of an exclusion of income allowed ministers of the gospel constitutes an impermissible constitutional discrimination and a violation of the establishment clause of the First Amendment. If, however, appellants should be found correct in this contention and section 107(2) should be held invalid as an impermissible discrimination or as a law "respecting the establishment of religion", it would not affect the tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion.

This proceeding was instituted in the Tax Court by a "petition for redetermination of the deficiency set forth by the Commissioner * * * in his notice of a deficiency". It is not an action by a taxpayer challenging alleged unconstitutional federal taxing or spending programs.[10] Assuming that appellants as taxpayers could in a proper action raise the constitutional issues here asserted, neither the Tax Court nor this court may properly consider these issues in this proceeding, particularly in view of the fact that appellants would not in any event be entitled to the exclusion.

Affirmed.

"a full-time cantor of the Jewish faith, qualifies as a 'minister of the gospel' within the spirit, meaning and intendment of section 107". There is no contention here that Kirk qualifies as a minister of the gospel.

[10] Upon demonstrating the necessary "personal stake" in the outcome of the litigation, taxpayers in a proper action may challenge allegedly unconstitutional federal taxing and spending programs. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Protestants and Other Americans, Etc. v. Watson, 132 U.S.App.D.C. 329, 407 F.2d 1264 (1968).

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.)

Section 107. Rental value of parsonages.

"In the case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."

Section 6213. Restrictions applicable to deficiencies; petition to Tax Court.

"(a) *Time for filing petition and restriction on assessment.* Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

APPENDIX C

Memorandum Filed With Tax Return for 1964

To: District Director, Internal Revenue Service.

From: W. Astor Kirk.

Subject: Housing Allowance.

1. The adjusted gross income listed in line 9, page 1 (Form 1040) enclosed herewith does not include the rental allowance paid to me by my employer, as part of my compensation, for the purpose of providing a house for me and my family.

2. I am one of twelve professional staff persons employed by my employer, the General Board of Christian Social Concerns of The Methodist Church. Though I am not an ordained clergyman, the professional services which I render to the board are no different from those rendered by my staff colleagues. As a senior executive with professional training (Ph. D. degree in political science and economics) and experience in social science research and college teaching, I have the responsibility of planning and directing the board's social research and education programs in public affairs.

3. Since the board established its national headquarters in Washington, D. C., it has provided a rental allowance for all of its professional staff, as part of each staff person's compensation, which allowance is to be used to rent or otherwise provide a home.

4. Under the facts set forth in paragraphs 2 and 3 above, it is asserted that administrative non-application of Section 107 of the Internal Revenue Code to the rental allowance paid to me by my employer would be arbitrary, unreasonable, and discriminatory administrative action. Such action would deprive me of property without due process of law. See *Bolling* v. *Sharpe*, 347 U. S. 497.

5. If the reply to paragraph 4 hereof be that Section 107 of the Internal Revenue Code permits no administrative discretion under the circumstances stipulated in paragraphs 2 and 3 above, then I must (and do hereby) assert that the said section of the code is contrary to the "no establishment of religion" clause of the First Amendment. The controlling rule is that any legislative enactment is constitutionally invalid if its *purpose* or *primary effect* is either the advancement or inhibition of a religious interest. See *Abington School District v. Schempp*, 374 U. S. 203, at p. 222.

/s/ W. Astor Kirk
W. Astor Kirk
April 12, 1965